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No. 16

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

CALTEX (PHILIPPINES), INCORPORATED, THE SHELL COMPANY OF PHILIPPINE ISLANDS, LIMITED AND STANDARD-VACUUM OIL CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of Argument	6
Argument:	
The destruction during hostilities of private property of military value, to prevent such property from falling into the hands of the advancing enemy, is not a taking for public use which requires the payment of just compensation under the Fifth Amendment	11
A. The United States cannot assume a rigid and unlimited liability for property which it destroys to deny its use to an enemy	12
B. Even as an original matter, such destruction would not constitute a taking of property for public use within the meaning of the Fifth Amendment	20
C. This Court has held that the Fifth Amendment does not require payment of compensation for property destroyed by the United States to deny its use to the enemy or otherwise to protect American forces	26
D. The repeated refusal of Congress to pay for property so destroyed is persuasive evidence that the Fifth Amendment does not require such payment of compensation	38
E. No accepted principle or practice in international law suggests that compensation for the destruction of property to deny its use to the enemy should be required under the Fifth Amendment	54
Conclusion	63
Appendix	64

CITATIONS

Cases:	
Aitken v. *Village of Wells River*, 70 Vt. 308	24
American Print Works v. *Lawrence*, 23 N. J. L. 590	24
Bowditch v. *Boston*, 101 U. S. 16	23
Bowles v. *Willingham*, 321 U. S. 503	22
Carolene Products Co. v. *United States*, 323 U. S. 18	21
C. B. & Q. Railway v. *Drainage Comm'rs*, 200 U. S. 561	21

223691—52——1

Cases—Continued

	Page
Commers v. *United States*, 159 F. 2d 248, certiorari denied, 331 U. S. 807	23
County of Mobile v. *Kimball*, 102 U. S. 691	21
Dennis v. *United States*, 341 U. S. 494	15
Falbo v. *United States*, 320 U. S. 549	23
Field v. *City of Des Moines*, 39 Iowa 575	24
Ford v. *Surget*, 97 U. S. 594	25
General Motors Acceptance Corp. v. *United States*, 286 U. S. 49	21
Grant v. *United States:*	
1 C. Cls. 41	26, 27, 32
2 C. Cls. 551	16
Hamilton v. *Kentucky Distilleries*, 251 U. S. 146	22
Harrison v. *Wisdom*, 54 Tenn. 99	24
Heflebower v. *United States*, 21 C. Cls. 225	28
Hirabayashi v. *United States*, 320 U. S. 81	23
Houck v. *Little River Drainage District*, 239 U. S. 254	21
Juragua Iron Co. v. *United States*, 42 C. Cls. 99, affirmed, 212 U. S. 297	9, 10, 26, 35–37, 38, 58, 59
Korematsu v. *United States*, 323 U. S. 214	23
Lawton v. *Steele*, 152 U. S. 133	21, 24
Lichter v. *United States*, 334 U. S. 742	22, 26
McDonald v. *City of Red Wing*, 13 Minn. 38	24
Miller v. *Schoene*, 276 U. S. 272	8, 21, 24
Miller v. *United States*, 11 Wall. 268	22
Mitchell v. *Harmony*, 13 How. 115	13, 25, 26, 27, 32, 37
Mugler v. *Kansas*, 123 U. S. 623	21
North American Storage Co. v. *Chicago*, 211 U. S. 306	21, 25
Oro Fino Cons. Mines, Inc. v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U. S. 948	23
Parham v. *The Justices*, 9 Ga. 341	24
Peabody v. *United States*, 231 U. S. 530	22
Perrin v. *United States*, 4 C. Cls. 543, affirmed, 12 Wall. 315	13
Portsmouth Harbor Land & Hotel Co. v. *United States*, 260 U. S. 327	22
Powell v. *Pennsylvania*, 127 U. S. 678	21
Presbyterian Church v. *United States*, 33 C. Cls. 339	28
Respyblica v. *Sparhawk*, 1 Dall. (Pa.) 357	24
Jacob Ruppert v. *Caffey*, 251 U. S. 264	22
Russell v. *The Mayor*, 2 Denio (N. Y.) 461	24
Russian Volunteer Fleet v. *United States* 282 U. S. 481	53
St. Regis Paper Co. v. *United States*, 110 C. Cls. 271, certiorari denied, 335 U. S. 815	23
Selective Draft Law Cases, 245 U. S. 366	23
Stewart & Bro. v. *Bowles*, 322 U. S. 398	23
United States v. *Bethlehem Steel Corp.*, 315 U. S. 289	26
United States v. *Chemical Foundation, Inc.*, 272 U. S. 1	22

Cases—Continued Page

United States v. *One Ford Coupe*, 272 U. S. 321 21
United States v. *Pacific Railroad*, 120 U. S. 227 ..... 9, 17, 25, 26, 29-34, 38, 39, 44, 63
Walker v. *United States*, 34 C. Cls. 345 28
Wallace v. *City of Richmond*, 94 Va. 204 24
Wiggins v. *United States*, 3 C. Cls. 412 ..... 26, 28, 32
Yakus v. *United States*, 321 U. S. 414 22
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U. S. 579 38

Constitution, Public and Private Laws and Convention:
U. S. Constitution, Fifth Amendment 6, 7, 11, 14
Act of April 9, 1816, 3 Stat. 261:
Sec. 5 41
Sec. 9 41
Act of March 3, 1817, 3 Stat. 397, Sec. 9 42
Act of July 4, 1864, 13 Stat. 381 ..... 28, 42, 43
Act of June 22, 1874, 18 Stat. 604 48
Act of March 3, 1883, 22 Stat. 485 ..... 28, 48
Act for Relief of Josiah O. Armes, 14 Stat. 617 44
Act for Relief of East Tennessee University, 18 Stat. 604 48
Act for Relief of University of Kentucky, 16 Stat. 678 48
Act for Relief of William H. Washington, 6 Stat. 151 42
Contract Settlement Act of 1944, 58 Stat. 649, 41 U. S. C. 117, Sec. 17 53
Federal Tort Claims Act of 1946, 28 U. S. C. 2680 51
Foreign Claims Act, 31 U. S. C. 224d 51
Hague Convention, IV of 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2277, Art. 23 (g) 37
Lucas Act of 1946, 60 Stat. 902, 41 U. S. C. 106, note 54
Marine War Risk Insurance Acts, June 29, 1936, 49 Stat. 1985, as amended, 54 Stat. 689; 56 Stat. 140; 56 Stat. 214; 57 Stat. 47; 58 Stat. 216; 46 U. S. C. 1128 53
Military Claims Act, 31 U. S. C. 223b 51
Philippine Rehabilitation Act of 1946, 60 Stat. 128, 50 U. S. C. App. 1751, *et. seq* 51
Sec. 102 52
Sec. 104 (c) 19
Requisition of Military Materials Act of Oct. 16, 1941, 55 Stat. 742–743, as amended, 50 U. S. C. App. 721–724 5
War Claims Act of July 3, 1948, 62 Stat. 1245, 50 U. S. C. App., Supp. V, 2007, Sec. 8 54
War Damage Insurance Act of 1942, 56 Stat. 174, 15 U. S. C. 606 b–2 53
War Damage Act, 1943, 6 & 7 Geo. VI, c. 2d, Sec. 20, Part I 19

Miscellaneous:
American State Papers, Class IX, Claims:
No. 243, p. 424 40
No. 266, p. 446 42
No. 412, p. 590 42
No. 536, pp. 752–753 40

Miscellaneous—Continued

American State Papers, Class IX, Claims—Continued Page
No. 587, p. 835 ... 40
The Army Air Forces in World War II:
Vol. II ... 14
Vol. III ... 15
Bill for Relief of J. Milton Best ... 43, 45
Bill for Relief of East Tennessee University ... 43, 47
Bill for Relief of Thomas B. Wallace ... 43
Bill for Relief for Destruction of Manchester, Ky. Salt-Works ... 43, 45
Bill for Relief of William Hardman ... 50
Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 264–265 ... 57
Bouvier, *Law Dictionary* (Rawle's Third Revision), p. 195 ... 55
Brooks, *A Survey of Progress Towards Payment of War Damage Compensation in Europe*, 1 Intl. L. Q. 301 ... 53
Cong. Globe, 38th Cong., 1st Sess.:
p. 127 ... 43
pp. 164–168 ... 43
p. 261 ... 43
p. 282 ... 43
pp. 909–920 ... 43
pp. 924–926 ... 43
p. 1010 ... 43
p. 2774 ... 43
p. 2778 ... 43
p. 2781 ... 43
p. 3188 ... 43
pp. 3418–3420 ... 43
p. 3499 ... 43
p. 3513 ... 43
p. 3544 ... 43
p. 3547 ... 43
Cong. Globe, 41st Cong., 2d Sess.:
p. 1947 ... 44
pp. 2986–2987 ... 44
p. 4587 ... 44
Cong. Globe, 41st Cong., 3rd Sess.:
pp. 62–63 ... 44
pp. 97–102 ... 44
pp. 165–169 ... 44
pp. 295–304 ... 44
pp. 311–319 ... 44
p. 1934 ... 44
Cong. Globe, 42nd Cong., 1st Sess., pp. 22–84 ... 44
Cong. Globe, 42nd Cong., 2nd Sess.:
p. 120 ... 44
p. 1176 ... 45
pp. 2252–2253 ... 44

Miscellaneous—Continued
Cong. Globe, 42nd Cong., 2nd Sess.—Continued Page
p. 2258 45
p. 2259 45
p. 2302 45
p. 3148 44, 45
pp. 3621–3624 44
p. 3648 44
p. 3696 44
pp. 4155–4156 44
Cong. Globe, 42nd Cong., 3rd Sess.:
pp. 694–697 45
p. 722 45
p. 897 45
p. 919 45
p. 929 45
p. 930 45
p. 949 45
p. 1164 44
p. 1288 49
p. 1309 49
p. 1680 44
2 Cong. Rec.:
p. 10 44
p. 29 44
pp. 1317–1319 48
p. 1665 44
pp. 5200–5201 48
4 Cong. Rec.:
p. 4364 45
p. 4467 45
6 Cong. Rec.:
p. 58 45
p. 238 45
13 Cong. Rec.:
p. 51 45
pp. 3147–3167 48
pp. 3184–3206 48
14 Cong. Rec.:
pp. 908–912 48
pp. 946–953 48
p. 3660 48
pp. 3672–3673 48
15 Cong. Rec.:
p. 11 45
p. 759 45
17 Cong. Rec.:
p. 1033 45
p. 3176 45

Miscellaneous—Continued	Page
S. Rep. No. 224, 57th Cong., 1st Sess.	51
S. Rep. No. 755, 79th Cong., 1st Sess.	51
Spaight, *War Rights on Land* (1911 Ed.):	
pp. 111 ff.	55
pp. 510–512	55
A *Symposium on Labor Law in War-Time* (1944), 29 Iowa L. Rev. 145, *et seq.*	23
Taylor, *International Public Law* (1901):	
pp. 556–557	55, 57
pp. 701–704	55
II U. S. Foreign Rel. (1926), pp. 308–335	60
Vattel, *Law of Nations*, Bk. III, c. XV, Sec. 232	55
War Department Basic Field Manual, *Rules of Land Warfare* (1940 ed.) (F. M. 27–10), par. 314	56
II Wharton, *International Law Digest* (2nd Ed.), p. 587	57
II Whiteman, *Damages in International Law* (1937), p. 1429	56
Wolff, *Jus Jentium Methodo Scientifica Pertractatum*, § 830, *The Classics of International Law*, No. 13, Vol. II, (1934 ed.)	56
Wormser, *Collection of International War Damage Claims* (1944), pp. 157–158	57

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OPINION BELOW

The opinion of the Court of Claims (IR. 44) is reported at 120 C. Cls. 518.

JURISDICTION

The judgment of the Court of Claims was entered on November 6, 1951 (IR. 61). The petition for a writ of certiorari was filed on February 23, 1952, and was granted on May 26, 1952 (IR. 65). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the destruction during hostilities of private property of military value, to prevent such property from falling into the hands of the advancing enemy, is a taking for public use which requires the payment of just compensation under the Fifth Amendment.

STATEMENT

The respondent oil companies brought suit to recover just compensation for their terminal facilities in Manila, Philippine Islands, which were destroyed by the United States Army in its evacuation of the area before advancing Japanese troops.[1] The Court of Claims held the Government liable and reserved determination of the exact amounts of recovery for further proceedings.[2]

The pertinent facts may be summarized as follows: Four commercial oil companies maintained terminals in the Pandacan District of Manila, which were of great military value for the supply and storage of petroleum products (IR. 3).

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[1] Three suits were filed which were consolidated in the court below. Certain claims, in addition to those for destruction of their terminal facilities in Manila, were made and adjudicated in the court below. The writ of certiorari, however, is directed solely to that portion of the judgment which relates to the oil terminal facilities at Manila.

[2] Under Rule 38 (c) of the Rules of the United States Court of Claims, trials in the first instance may be limited to the issues of law and fact relating to the right of recovery, with determination of the amount of recovery reserved for further proceedings.

The terminal facilities included wharves, rail and pipe lines, pumps, storage tanks, warehouses, residences for superintendents, can factories, cans, railroad tank cars, bulk tank trucks, package trucks and loading facilities (IR. 3).

The Philippines were subjected to enemy air attacks immediately after the attack on Pearl Harbor (IR. 35). On December 23, 1941, the Commanding General ordered the withdrawal of all troops on Luzon to Bataan Peninsula (IR. 38). On December 25, Manila was declared an open city (IR. 39). On December 26, the terminals were ordered to be prepared for demolition at a date then undetermined (IR. 39). On December 27, representatives of the oil companies were advised that the equipment would have to be destroyed, that they would receive orders in due course pertaining to destruction, and that a demolition net-work was being laid (IR. 39–40). The demolition charges and net-work were in place within two or three days (IR. 39).

At about the same time, in order to perfect the authority of the Chief Engineer of the Army in the Philippines to destroy the facilities, the Deputy Chief of Staff signed letters addressed to the oil companies directing them "on telephonic or personal instructions issued to you by a designated representative of this Headquarters" "to so disable all vital parts of your plant and station as to deny their use to the enemy (IR. 40).

The evidence did not establish whether or not these letters were actually delivered (IR. 41). The Chief Engineer had previously prepared letters dated December 25, 1941, addressed to the oil companies, stating that the terminal facilities "are requisitioned by the United States Army" and "that any action deemed necessary for the destruction of this property will be handled by the United States Army" (IR. 39). These letters were delivered to the representatives of two of the oil companies on or about December 27, shortly after they were advised of the necessity for destruction, but the evidence did not establish whether the letters were delivered to the others (IR. 39, 40). Because two or more of the representatives of the oil companies protested having anything to do with demolition, in view of the probability of having to answer to the Japanese (IR. 40), the terminals were demolished by the Army acting upon orders of the Chief Engineer on December 31, 1941 (IR. 41).[3] The Japanese were already entering Manila at that time (IR. 48).

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[3] Acquisition of real property was centralized under the Department Quartermaster and was authorized by no other echelons of command (IR. 35). Demolition of property was a function of the Engineers under the command of the Chief of Engineers (IR. 35). Prior to December 1, 1941, no authority to make war-time requisition of either the use of or title to private property had been delegated to anyone by the Commanding General (IR. 35).

After the liberation of Manila in February 1945, representatives of the oil companies applied to the Chief Engineer for release of the site of the terminals which was then occupied by the Army, and all the land was restored during 1945 and 1946 without a formal reconveyance (IR. 41; II R. 276–278, 279–281, 282–283).[4]

The Court of Claims found that the Army requisitioned the terminal facilities on December 27, 1941, "in anticipation and for the purpose of destruction to prevent items of military value from falling into the hands of the enemy" (IR. 41, 42).[5] Although recognizing that "the only use the Army made of plaintiffs' terminal facilities following the requisition on December 27, 1941, was to destroy them" (IR. 48), it held that their destruction "was a use thereof in the common defense" and a taking which entitled the owners to just compensation (IR. 54). The Chief Judge and Judge Whitaker dissented on the ground "that property destroyed in actual battle by either side does not call for compensation" (IR. 58), "that the destruction was due to

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[4] No claims for compensation are made by the oil companies for the use of this land.

[5] No significance can be attached to the finding that the facilities were "requisitioned" in view of the court's express disclaimer of reliance on the Requisition of Military Materials Act of Oct. 16, 1941, 55 Stat. 742–743, as amended, 50 U. S. C. App. 721–724, "as it is apparent that no effort was made to comply with that Act" (IR. 47).

battle conditions" and, therefore, was not "taken for public use within the meaning of the Fifth Amendment" (IR. 61).

SUMMARY OF ARGUMENT

The court below has erroneously held that the destruction of property of military value to deny its use to an advancing enemy is a taking of property for public use for which the Fifth Amendment requires payment of compensation by the United States. In so holding, the court below has imposed upon the United States a rigid obligation for payment of war losses such as no government dares to assume. Its decision is in conflict with controlling decisions of this Court, the long-standing view of Congress that such destructions are not compensable as a matter of right, and the trend in international law to deny liability for such losses.

A. It is conceded that the United States is not required by the Fifth Amendment to compensate its nationals or others for property destroyed or damaged as an incident to battle. If the respondent's oil terminals had been destroyed by the advancing Japanese forces, no liability would be imposed upon the United States. Similarly, if the oil terminals had been captured intact by the Japanese, our armed forces could then have destroyed them by bombing or shelling without imposing any liability upon the United States. It would be entirely unrealistic to hold that on

January 1, 1942, our armed forces could have destroyed the terminals in Japanese hands at great risk and perhaps haphazardly without creating any liability under the Fifth Amendment, but that liability exists because the terminals were safely and thoroughly destroyed the day before the Japanese occupied the area. In these circumstances, the destruction of the terminals to deny their use to the enemy is indistinguishable from battle damage, and neither is compensable as a matter of right.

In addition, the military situation on December 27, 1941, when the terminals were requisitioned for destruction, rendered the terminals valueless to the respondents. It was, of course, immaterial to them whether the terminals were rendered useless before or after they were taken by the Japanese. If American forces had not destroyed the terminals when they did, the value of the terminals was so speculative, depending solely upon a remote possibility that they would survive the war intact, as to constitute a further reason for holding such destruction to be non-compensable.

Governments do not obligate themselves to pay for battle damage because they cannot afford to assume what may in some cases be stupendous liabilities. For the same reason, the Fifth Amendment should not be interpreted as imposing upon the United States a rigid obligation to pay for property which it destroys to deny its use to an enemy. History shows that nations

sometimes find it necessary to employ tactics of defensive destruction, i. e., the "scorched earth" policy, on a scale which would preclude the assumption of any rigid obligation to pay for such destruction.

In view of the destructiveness of modern warfare, it is essential for the United States to retain freedom of action to deal with all of the devastation of war in terms of over-all reconstruction needs. The experience of World War II has already demonstrated that problems of large-scale reconstruction cannot be solved by rigid legal rules of compensation for particular types of war damage.

B. Even if the question were one of first impression, the legal principles which have been developed in analogous cases of destruction of private property in the public interest, and in determining compensability for losses incident to government regulation in both peace and war, must lead to the conclusion that the destruction of property to deny its use to the enemy is not compensable under the Fifth Amendment. The conflagration cases, holding that property may be destroyed without compensation to prevent the spread of a fire, and *Miller* v. *Schoene*, 276 U. S. 272, holding that cedar trees may be destroyed without compensation to protect a valuable apple industry, sufficiently indicate that the destruction of respondents' oil terminals was not a taking

for public use for which the United States must pay.

C. Furthermore, the question is not open. This case is controlled by *United States* v. *Pacific Railroad,* 120 U. S. 227, in which this Court concluded as an essential link in its reasoning that the destruction of property by the United States to impede the advance of an enemy, like property destroyed in the hands of an enemy, is not compensable as of right under the Fifth Amendment. Again, in *Juragua Iron Co.* v. *United States,* 212 U. S. 297, this Court, adopting the rationale of its earlier decision, held that the United States was not required to pay for American property in Cuba which had been destroyed to protect the health of its armed forces in the field.

D. The conclusion of this Court that the Fifth Amendment does not require the United States to pay for property destroyed to deny its use to the enemy, finds the strongest support in the long-standing view of the Congress that the United States is not liable for such war losses. Claims for such destruction arising out of the Revolution and every later conflict have been presented to Congress. A few have been paid. More significant, payment has been denied in many cases. Particularly following the Civil War, in which many such claims arose, Congress and its committees have repeatedly, and after full consideration, concluded that such destruction, like

destruction in actual combat, is not compensable as of right. As recently as 1946, in the Philippine Rehabilitation Act, Congress in effect reiterated its view that property destroyed to prevent its use by the enemy was compensable only as a matter of grace, by providing partial compensation both for property so destroyed and property destroyed or damaged in battle.

E. If, as respondents contend, it was the generally accepted rule and practice in international law to require compensation for neutral property destroyed by a belligerent to deny its use to the enemy, such a rule and practice would be persuasive, although far from decisive, in the construction of the just compensation clause of the Fifth Amendment. However, writers on international law have divided on the question of liability for such destruction. In the nineteenth and early twentieth century, and particularly in the aftermath of the Civil War, international mixed claims commissions both granted and denied compensation for such destruction in several cases involving property located in enemy territory. The principle of the cases imposing liability was rejected for our law in *Juragua Iron Co.* v. *United States, supra.* Moreover, while the Department of State apparently accepted the result of those cases and sought to obtain similar recognition of such claims by American nationals against foreign governments, it is now clear that the trend is toward denial

of compensation for property destroyed to deprive the enemy of its use.

ARGUMENT

THE DESTRUCTION DURING HOSTILITIES OF PRIVATE PROPERTY OF MILITARY VALUE, TO PREVENT SUCH PROPERTY FROM FALLING INTO THE HANDS OF THE ADVANCING ENEMY, IS NOT A TAKING FOR PUBLIC USE WHICH REQUIRES THE PAYMENT OF JUST COMPENSATION UNDER THE FIFTH AMENDMENT

The sole question in this case is whether the command of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation," requires the United States to pay for private property of military value which was destroyed by its armed forces to prevent such property from falling into the hands of advancing enemy forces. The decision below is based upon the view that the destruction of property "to deny it to the enemy was as much a public use as if it had been consumed by friendly troops in battle" (IR. 51) and must therefore be paid for under the Fifth Amendment. We contend that the decision is erroneous in that by exalting the supposed equities of this case into a rigid constitutional rule it potentially exposes the United States to financial burdens which no government dares to assume, and in that it disregards the contrary interpretation of the Fifth Amendment by this Court, the Congress and the President.

A. THE UNITED STATES CANNOT ASSUME A RIGID AND UNLIMITED LIABILITY FOR PROPERTY WHICH IT DESTROYS TO DENY ITS USE TO AN ENEMY

In later subsections of the brief, we point out that this Court, the Congress, and the President have all denied liability for property of military value destroyed to prevent its use by the enemy. In this part, we shall treat the matter as *res nova* and detail the underlying considerations making it inadvisable and inappropriate for the Court to lay down any rigid rule, rooted in the Constitution, of liability in such circumstances.

No government assumes a legal obligation to compensate its citizens for property destroyed in battle, whether by the action of its own or enemy forces. Governments do not legally obligate themselves to pay for such damage because it often reaches such proportions that they cannot afford to do so fully, as would be required under any legal prineiple of just compensation. Property destroyed to prevent it from falling into the hands of the enemy is just as much the result of military operations as battle damage. It is neither practical nor equitable to attach to the former a rigid right to full compensation which concededly does not exist with respect to battle damage.

The property here involved consisted of oil terminal facilities owned by the three respondents and located in Manila, Philippine Islands. The unchallenged findings of the Court of Claims

are that the property was requisitioned by the Army on December 27, 1941, "in anticipation and for the purpose of destruction to prevent items of military value from falling into the hands of the enemy" (IR. 42) and that the property was destroyed on December 31, when the Japanese forces were entering Manila (IR. 48). It is undisputed that these circumstances justified the destruction of the property, so that damages could not be recovered from the Army personnel who directed the destruction. *Mitchell* v. *Harmony,* 13 How. 115, 133.

If the Japanese forces had destroyed the oil terminals while they were in American hands, as by bombing or shelling, the United States clearly would not be obligated under the Fifth Amendment to compensate the respondents for the loss of their property. Similarly, if the Japanese forces had captured the oil terminals intact, and the terminals were then destroyed by the United States, as by bombing or shelling, the United States would be under no obligation to pay for such destruction. *Perrin* v. *United States,* 4 Ct. Cl. 543, 547–548, affirmed, 12 Wall. 315. These propositions apparently are conceded by the court below (IR. 54) and by the respondents (Br. in Opp., pp. 7–8), on the ground that they would be "due to the ravages of war inflicted by our own or enemy forces in the conduct of a campaign" (IR. 54). We submit that, both from

the point of view of the owners and in the lack of beneficial use by the United States, there is no basis for distinguishing the destruction of property to deny it to the enemy from the destruction of property by the enemy or while in the enemy's possession. Compensation is not required for either, and for the same reasons.

Viewed realistically, the military situation on December 27, 1941, had rendered the Pandacan oil terminals completely without value to the respondents. If the United States had not systematically destroyed the oil terminals when it did, they would have been in the hands of the Japanese a few hours or a day later. As soon as they were in Japanese possession, American airmen or ground raiders, at the risk of their lives, could have destroyed the terminals without imposing upon the United States any obligation to compensate the owners. It is completely anomalous to say that the Fifth Amendment imposes an obligation to pay because the terminals were thoroughly and safely destroyed while still in American possession to deny their use to the Japanese. The Constitution places no such premium upon the hard way of waging war.[5a]

[5a] During World War I, the retreating Allies severely damaged the Rumanian oil fields to deny their use to the advancing Germans (See *infra*, p. 60). In World War II, with Rumania on the side of the Axis powers, only air attack could deprive Germany and her Allies of Rumanian oil. The first American raid on the Ploesti refineries cost 54 planes. *The Army Air Forces in World War II*, vol. II, pp.

From respondent's point of view, it could make no difference whether their terminals were destroyed before or after they fell into Japanese hands. As President Grant, whose authority in military matters will be conceded, stated in vetoing a bill providing payment for a Kentucky salt works which was destroyed by Union forces to deny its use to the Confederacy, "Had General Craft and his command destroyed the salt-works by shelling out the enemy found in their actual occupancy, the case would not have been different in principle from the one presented in this bill. What possible difference can it make in the rights of owners or the obligations of the Government, whether the destruction was in driving the enemy out, or in keeping them out, of the possession of the salt-works?"[6]

Here, the destruction of the respondents' oil terminals was as much the result of the military situation, rather than a "taking" by the United States, as though it had been destroyed in actual battle. As the dissenting opinion below points out (IR. 60): "There was no hope of saving the property. If the city were further defended, the property would undoubtedly be destroyed. If it fell into the hands of the Japanese it would certainly be destroyed before they gave it up. In

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477–483. The total cost of depriving the Axis powers [illegible] use of the Ploesti facilities included the loss of 350 heavy bombers. *Id.*, vol. III, p. 298.

[6] Senate Ex. Doc. 42, 42d Cong., 3d Sess.

fact, practically all Manila, residential and otherwise, was destroyed in the process of retaking three years later. Any possible value to the plaintiffs was gone whichever horn of the dilemma is taken." In the words of the House Committee on War-Claims, House Report 134, 43d Cong., 2d Sess., p. 284 (the so-called Lawrence report), "A nation should not be liable for property taken to prevent it from falling into the hands of an enemy, because it is impossible to establish any just measure of damages. What is the value of property liable to the imminent impending danger of being taken or destroyed by rebels? Why should the Government pay when the markets of the world could not supply another purchaser?"

The value to its owners of property of military value in the path of an advancing enemy is so hopelessly speculative as to preclude any obligation to pay for its destruction to deny it to the enemy. To paraphrase the Lawrence report, why should the United States pay for the destruction of oil terminals on December 31 which it could destroy on January 1 without any obligation to pay? It was this absence of value to the owners of property thus situated and destroyed by the United States which led Judge Loring to dissent in *Grant* v. *United States,* 2 Ct. Cl. 551, and prompted even the court below in this case to state (IR. 54) that, "The nearness of the enemy and the causes necessitating the destruction, we

feel, made the Army's action lawful *and may have a bearing upon the question of damages* * * *." (Emphasis supplied.)

Since the destruction of property to deny its use to the enemy is indistinguishable from other war damage, both from the point of view of the owners and in the lack of beneficial use by the United States, the reasons why the United States should not be required to pay compensation are identical. Governments do not *obligate* themselves to pay for battle damage to their citizens' property, whether caused by their own or enemy forces, because they cannot afford to assume what may be enormous obligations. Similarly, governments do not dare commit themselves to pay full compensation for their citizens' property which they destroy pursuant to a policy of defensive devastation. As stated by this Court in *United States* v. *Pacific Railroad,* 120 U. S. 227, at pp. 233-234, with reference to the Civil War:

> The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation.

The destruction of both public and private property in time of war in order to deny its use to an advancing enemy is an old defensive measure. In modern times, it was employed by Russia against Napoleon, by the Soviet Union against Germany and by Germany against the Soviet Union during World War II, and also

during World War II by other belligerents on a smaller scale, as by the Dutch in the East Indies. Such destruction has been applied not merely to military equipment but also to food, crops, fuel, housing, transportation, communication and storage facilities and anything else which would assist the enemy's military effort. It has been done on such a scale and with such thoroughness that it is commonly referred to as the "scorched earth policy."

It is impossible not to regret the losses incurred by the respondents through no fault of their own. It is also true that if Congress chose, as a matter of grace, to reimburse American property owners for the relatively small amount of their property which was destroyed to deny it to the enemy during World War II, no serious financial consequences would ensue. However, the fact that other nations have had occasion to apply this military policy on a large scale warns that the Fifth Amendment should not be construed to place upon the United States a rigid obligation to pay which, under certain conditions, might create impossible financial burdens for the Government.

Given the destructiveness of any future warfare, responsible governments need to retain freedom of action to deal with great devastation in terms of over-all reconstruction needs and priorities. In such circumstances, for example, much battle damage, admittedly non-compensable

under the Fifth Amendment, might require priority for restoration out of public funds over damage as to which the decision below imposes an absolute obligation upon the United States. The prime purpose of such a reconstruction program would be to insure the replacement of essential facilities, rather than to put cash in the pockets of former property owners. Thus, Section 104 (c) of the Philippine Rehabilitation Act of 1946, 60 Stat. 128, 130, requires that payments made under that Act be used to replace or repair the damaged property or, where that is impossible, "reinvested in such manner as will further the rehabilitation or economic development of the Philippines."[7] Such problems of reconstruction after destructive warfare cannot be solved by creating rigid legal rules for the payment of compensation for particular types of war damage.

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[7] See also Section 20, Part I, War Damage Act, 1943, 6 & 7 Geo. VI, c. 21:

> The Treasury shall give directions to be observed by the Commission for securing that the provisions of this Part of this Act relating to the making of payments in respect of war damage shall be executed in conformity with the public interest as respects town and country planning, the provision of housing accommodation, the development of industries and services and of agriculture, the preservation of amenities, the consumption of supplies of building materials for the time being available, the building requirements of persons engaged in work of public importance, and such other matters as may be prescribed.

B. EVEN AS AN ORIGINAL MATTER, SUCH DESTRUCTION WOULD NOT CONSTITUTE A TAKING OF PROPERTY FOR PUBLIC USE WITHIN THE MEANING OF THE FIFTH AMENDMENT

Ignoring these policy considerations, the court below reasoned that "the destruction of the Pandacan terminals was a use thereof in the common defense," and that "the power of the Federal Government, derived from and limited by the Constitution does not extend to the deliberate destruction of an individual's property for the common cause without the payment to the owner of just compensation." (IR. 54, 55). It is a "fundamental principle," the court stated, that the burden of the common defense "should be distributed among the people as uniformly as practicable * * * that the public generally should bear the cost." (IR. 53–54.) While we shall later discuss the decisions of this Court which have already determined that the destruction of property to deny its use to the enemy is not compensable under the Fifth Amendment, it may be useful to point out that this rationale of the court below is refuted by the many decisions of this Court defining the circumstances in which governmental action creates a right to compensation under the Fifth Amendment. Like the other provisions of the Bill of Rights, the Fifth Amendment is neither unqualified nor a prohibitive restriction upon the exercise of necessary governmental powers.

Thus, although taxation for a public purpose is obviously a taking of private property, the exercise of the tax power is not governed by the principles of eminent domain. *Houck* v. *Little River Drainage District*, 239 U. S. 254, 264–265; *County of Mobile* v. *Kimball*, 102 U. S. 691, 703. Similarly, in the exercise of its power to impose fines and forfeitures, the Government may, as a reasonable aid to law enforcement, lawfully confiscate property used in violation of law although the owner is innocent of any knowledge of its illegal use. *General Motors Acceptance Corp.* v. *United States*, 286 U. S. 49; *United States* v. *One Ford Coupe*, 272 U. S. 321.

Of more pertinence here, a state may, in order to promote the public health, morals or safety, prohibit the manufacture and sale of an otherwise lawful commodity (*Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Carolene Products Co.* v. *United States*, 323 U. S. 18), and order the slaughter of diseased cattle and the destruction of decayed or unwholesome food (*North American Storage Co.* v. *Chicago*, 211 U. S. 306; *Lawton* v. *Steele*, 152 U. S. 133, 136). In some circumstances, private property may be destroyed even to promote the public convenience or the general prosperity of the State. *Miller* v. *Schoene*, 276 U. S. 272; *C. B. & Q. Railway* v. *Drainage Comm'rs*, 200 U. S. 561.

Under the war power, the Government may confiscate the property of alien enemies in the United States despite the fact that the Fifth Amendment applies broadly to "persons" and not only to "citizens." *Miller* v. *United States,* 11 Wall. 268; *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1, 11. Although artillery fire over adjoining land in time of peace may, in appropriate circumstances, constitute the taking of an easement for which just compensation must be paid, the Fifth Amendment is inapplicable to such action in time of war. *Peabody* v. *United States,* 231 U. S. 530; see *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U. S. 327, 335–336 (Brandeis, J., dissenting). Nor is the Fifth Amendment applicable to many wartime governmental actions which result in substantial damage to property interests. Thus, it is not a "taking" to regulate the rate at which an owner may rent his property even though it prevents the earning of a fair return on the property's value (*Bowles* v. *Willingham,* 321 U. S. 503); to fix the prices of commodities (*Yakus* v. *United States,* 321 U. S. 414); to restrict the right to earn profits (*Lichter* v. *United States,* 334 U. S. 742); to reduce the value of a business by prohibiting the sale of an otherwise lawful commodity (*Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264); to cause a company to curtail and

even to cease operations because deprived of needed materials by priority and allocation orders (*Steuart & Bro.* v. *Bowles,* 322 U. S. 398; *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815); or to order a company to close down its operations because of war needs (*Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U. S. 948).[8]

Further, property may be destroyed without compensation under the doctrine of inevitable necessity—the doctrine epitomized by the maxim *salus populi est suprema lex.* It is well-settled that the destruction of a house in the path of a conflagration to prevent the spread of the fire is not an eminent domain "taking." *Bowditch* v.

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[8] It is pertinent to observe that the non-compensable losses which result from the total mobilization of effort, man-power and property required to wage war successfully are not confined to property losses. Restrictions were also placed on wages, the right to strike, and collective bargaining. See *A Symposium on Labor Law in War-Time,* 29 Iowa L. Rev. 145, *et. seq.* The Government conscripted millions of citizens into the armed services, divorcing them from their normal pursuits, separating them from their families, and exposing them to the hardship and hazards of combat, including possible injury and loss of life. *Falbo* v. *United States,* 320 U. S. 549; *Selective Draft Law Cases,* 245 U. S. 366; cf. *Commers* v. *United States,* 159 F. 2d 248 (C. A. 9), certiorari denied, 331 U. S. 807. This Court sanctioned the restriction of the personal freedom of American citizens by curfew orders and the designation of areas from which a large class of citizens was excluded. *Hirabayashi* v. *United States,* 320 U. S. 81; *Korematsu* v. *United States,* 323 U. S. 214.

Boston, 101 U. S. 16; *Field* v. *City of Des Moines*, 39 Iowa 575; *Russell* v. *The Mayor*, 2 Denio (N. Y.) 461; *American Print Works* v. *Lawrence*, 23 N. J. L. 590, 605–607, 615; *McDonald* v. *City of Red Wing*, 13 Minn. 38. Similarly, the destruction of a mill and dam during a freshet to prevent the washing out of a highway does not require the payment of compensation. *Aitken* v. *Village of Wells River*, 70 Vt. 308. And, of particular significance here, it has been held that action by municipal authorities in collaboration with the townspeople to destroy liquor which otherwise would have fallen into the hands of advancing Federal troops during the Civil War was a justifiable, non-compensable destruction. *Harrison* v. *Wisdom*, 54 Tenn. 99; *Wallace* v. *City of Richmond*, 94 Va. 204. See also *Parham* v. *The Justices*, 9 Ga. 341, 349; *Respublica* v. *Sparhawk*, 1 Dall. (Pa.) 357, 362.

The losses necessarily incident to the actual conduct of hostilities, we submit, stand on no different constitutional footing than these other non-compensable losses. Plainly, the destruction of a basic war material on the field of battle to prevent its imminent capture and use by the enemy is no less a justified destruction of property than the destruction of valuable cedar trees to prevent the spread of cedar rust to apple trees (*Miller* v. *Schoene, supra*) or the destruction of fishing nets to preserve wildlife (*Lawton* v. *Steele, supra*). Property which will undoubtedly be used by the

enemy if captured is certainly no less a "nuisance" necessitating abatement than diseased cattle or decayed and unwholesome food (*North American Storage Co.* v. *Chicago, supra*). Nor can it be thought that the dictates of national self-preservation in the path of war are any less stringent than those of community preservation in the path of conflagration. The considerations of policy underlying the doctrine of inevitable necessity are immeasurably stronger in the circumstances here involved. As applied in the conflagration cases, the destruction of property is held justified even though it benefits but a few individuals. In contrast with that limited public purpose, the destruction of the respondents' properties served a common national need. Here, "*salus populi* is then, in truth, *suprema lex.*" *United States* v. *Pacific Railroad,* 120 U. S. 227, 234.[9] It is the nature of modern war that few can

[9] The opinion below suggests that the right to destroy another's property under the pressure of overbearing necessity and self-preservation is a right as between individuals and has no connection with the state's right of eminent domain (IR. 51, 55). This attempted distinction errs in two respects. First, it has long been recognized that the Nation possesses the right of self-preservation. *Dennis* v. *United States*, 341 U. S. 494, 501, 519. And, certainly, the Nation's right of self-preservation is of no less status than that of an individual. Second, the dsetruction of the respondents' properties was not an exercise of eminent domain but an exercise of the war power, resting upon the doctrine of necessity. *Mitchell* v. *Harmony*, 13 How. 115; *Ford* v. *Surget*, 97 U. S. 594, 606; see also 1 Nichols, *The Law of Eminent Domain* (3d Ed.) §§ 1.43, 1.44, 1.44 [7].

count confidently upon emerging unscathed. "In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." *Lichter* v. *United States*, 334 U. S. at 745. See also *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305.

C. THIS COURT HAS HELD THAT THE FIFTH AMENDMENT DOES NOT REQUIRE PAYMENT OF COMPENSATION FOR PROPERTY DESTROYED BY THE UNITED STATES TO DENY ITS USE TO THE ENEMY OR OTHERWISE TO PROTECT AMERICAN FORCES

Although recognizing that the destruction of property by either belligerent as an incident to battle does not create an obligation to pay for such property, the court below held that the Fifth Amendment requires payment of compensation for property destroyed to deny its use to the enemy. In so holding, the court relied upon its own earlier decisions in *Grant* v. *United States*, 1 Ct. Cl. 41 (1863) and *Wiggins* v. *United States*, 3 Ct. Cl. 412 (1867) and the dictum of this Court in *Mitchell* v. *Harmony*, 13 How. 115, 133 (1851). At the same time, the court below ignored the rationale of this Court's later decisions in *United States* v. *Pacific Railroad*, 120 U. S. 227, and *Juragua Iron Co.* v. *United States*, 212 U. S. 297, which reject the rule of the *Grant* and *Wiggins* cases.

Mitchell v. *Harmony*, *supra*, was an action for damages brought against an American army offi-

cer who, by compelling an American trader to accompany American forces on an expedition into Mexico during the Mexican war, brought about the loss of the latter's property. With respect to the defense that the trader had been required to remain with the army in order to prevent his property from falling into the hands of the enemy, this Court stated (at p. 133) that:

> There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

Since the suit was against the officer rather than the United States, it is clear, as the court below noted (R. 50), that the suggestion that the United States must pay compensation for property destroyed to deny it to the enemy is entirely dictum.

The question was presented squarely to the Court of Claims in *Grant* v. *United States, supra,* which involved the destruction by Union forces in Arizona of property of military value to deny its use to advancing Confederate forces. Relying upon Vattel, the minority view in the conflagration cases (see *supra,* pp. 23–24), and the dictum in *Mitchell* v. *Harmony,* the court below

held that such destruction was a taking for public use for which the Fifth Amendment required payment of just compensation. In 1864, a year later, Congress deprived the Court of Claims of jurisdiction over such claims, *inter alia*, arising out of the Civil War (*infra*, pp. 42–43). However, in 1867, *Wiggins* v. *United States*, *supra*, involving an analogous set of facts arising out of the American naval bombardment of Greytown, Nicaragua, was decided by the Court of Claims on the authority of its own decision in the *Grant* case.

It should be noted that, in several cases arising under the Act of July 4, 1864, 13 Stat. 381, and the Act of March 3, 1883, 22 Stat. 485, which withdrew jurisdiction over war damage claims from the Court of Claims, the court below subsequently expressed its disapproval, by way of dictum, of the *Grant* and *Wiggins* decisions. *Walker* v. *United States*, 34 C. Cls. 345, 346; *Presbyterian Church* v. *United States*, 33 C. Cls. 339, 340; *Heflebower* v. *United States*, 21 C. Cls. 228, 237–238. In the instant case, the court indicated its awareness that it had itself questioned the rule of the *Grant* and *Wiggins* cases, by stating that (R. 51) "Certain cases decided in this court under the Bowman Act (13 Stat. 381) [sic] contained dicta indicating that if the question had been then presented to the court, a contrary result might have been obtained" (citing the *Walker* and *Presbyterian Church* cases).

In any event, with this Court's decision in 1887 in *United States v. Pacific Railroad*, 120 U. S. 227, it was authoritatively established that the Fifth Amendment does not require the United States to pay for property destroyed to deny its use to the enemy. Briefly stated, the facts in the *Pacific Railroad* case were these: During the Civil War, a number of railroad bridges had been destroyed in Missouri, by order of the Federal commanding general, to prevent the advance of the enemy. Other bridges had been destroyed by the Confederate forces during their invasion of the State. To further the operations of its armies, the United States rebuilt four of those bridges, two of which had been destroyed by the Federal forces and two by the Confederate forces. Subsequently, to reimburse itself for the cost of rebuilding the bridges, the United States withheld payments due the Railroad for transportation services rendered. The Railroad brought suit to recover the sums due, and challenged the right of the United States to offset the costs of reconstruction.

This Court held that the destruction of the bridges was an act of military necessity for which the Government was not liable, and that their reconstruction was also a military necessity for which the Government could not charge the Railroad. In reaching this result, the Court considered exhaustively the nature of government lia-

bility for the taking and destruction of property "during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency." (120 U. S. at 239.) Drawing a distinction between property destroyed for military purposes and property taken for use by the Army, the Court stated with regard to the first category that (*id.* at 233–234):

> More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. *For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government.* By the well settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. *Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general.* Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. *The safety of the state in*

> *such cases overrides all considerations of private loss. Salus populi* is then, in truth, *suprema lex.* [Italics supplied.]

As to the second category of war losses, the Court declared (*id.* at 239):

> In what we have said as to the exemption of government from liability for priate property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell* v. *Harmony*, 13 How. 115, 134; *United States* v. *Russell*, 13 Wall. 623.

Concluding that the Railroad was not entitled to compensation for the bridges destroyed, the

Court held that, conversely, the Government could not recover for private property values created during military operations (*id.* at 239):

> *While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true,* that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. *Military necessity will justify the destruction of property,* but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government. [Italics supplied.]

Respondents' assertions that the *Grant, Wiggins,* and *Mitchell* cases were nowhere rejected by the Court and that the Court's statement that the Government "was not responsible for * * * the burning of bridges" (*id.* at 234) was a "gratuitous dictum" (Br. in Opp., p. 24) are flatly contradicted by the reasoning of the Court and the result reached. Admittedly, the Court was not required to decide whether the

Railroad could have recovered in an action for compensation for the destruction of the bridges, since the Railroad had not made a claim for such compensation. It is apparent from the opinion, however, that the Court considered it necessary to decide that question before reaching the question of the Railroad's liability to the Government for the reconstruction of the bridges. If the destruction of the bridges was a taking for a public use within the meaning of the Fifth Amendment, it necessarily followed that the Government could not charge the Railroad for the reconstruction of the bridges. Being obligated to indemnify the Railroad for the destroyed bridges, the Government's reconstruction of the bridges would merely have been in lieu of the payment of just compensation. Indeed, this was the very argument made by the Railroad in its brief before the Court. Citing the *Grant, Wiggins* and *Mitchell* cases, the Railroad argued that the Government's claim for compensation rested upon an expenditure which natural justice and equity would require it to make and urged the Court to leave the parties where the events of war had left them. See Brief for the Pacific Railroad, Nos. 728, 1303, October Term, 1886, pp. 26–33.[10]

[10] In the Court of Claims, the Pacific Railroad made the same argument as it did in the Supreme Court, relying upon *Vattel* and upon the *Grant, Wiggins, Mitchell* and *Russell* decisions. See Brief, in Court of Claims No. 11,825, December Term, 1884–1885.

As shown above, the Court did not adopt that view of the legal consequences of the destruction. It ruled instead that "while the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies." (*Id.* at 239.) It can hardly be supposed, therefore, that this Court was unaware of the *Grant, Wiggins* and *Mitchell* cases, or of the fact that its reasoning was incompatible with statements in those opinions. We think it not without significance that the Court cited the *Mitchell* case solely for the proposition that the government was liable for the military requisition and use of private property (*id.* at 239). On the other hand, as authority for its pronouncement that the Government was not liable for the burning of bridges to "embarrass or impede the advance of the enemy," the Court relied, as we do here, upon the familiar conflagration cases referred to above, pp. 23–24. (*Id.* at 234).

In sum, the issue here presented was necessarily met and fully considered by this Court in the *Pacific Railroad* case. To quote the dissent below, "if the railroad bridges were not 'taken for public use', then neither were the oil terminal facilities at Pandacan." (IR. 59).

In *Juragua Iron Co.* v. *United States*, 212 U. S. 297, this Court again refused to draw any distinction between property destroyed as an incident to battle and property deliberately destroyed to meet an immediate military necessity. The case involved the claim of an American corporation for compensation for the destruction of its buildings located in Cuba during the war with Spain. General Miles had ordered the buildings burned to protect his troops against yellow fever. The Court of Claims denied recovery, stating, after citing this Court's decision in *United States* v. *Pacific Railroad*, (which it did not then refer to as dictum) (42 Ct. Cl. 99, 113–114):

> That a belligerent is not liable for the necessary destruction of private property of a citizen caused by necessary military operations, is also so well settled as hardly to need reference to authorities.

In affirming the decision of the Court of Claims, this Court quoted (212 U. S. at 307) from its "dictum" in the *Pacific Railroad* case, as follows:

> The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well-settled doctrines of public law it was not responsible for

> them. * * * The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the Government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than of strict legal right."

Then the Court concluded that (212 U. S. at 308–309):

> * * * the owner of the property has no claim of any kind for compensation or damages; for, in such a case the Commanding General had as much right to destroy the property in question if the health and safety of his troops required that to be done, as he would have had if at the time the property had been occupied and was being used by the armed troops of the enemy for hostile purposes.

The respondents point out that the property involved in the *Juragua Iron Co.* case was located in enemy territory (Br. in Opp., p. 20). Even if that were the controlling factor in the decision, it would still constitute a rejection of the rule of those decisions of international tribunals and commissions, upon which the respondents rely (Br. in Opp., p. 18), requiring the United States to pay for neutral property which it destroyed in enemy territory in various conflicts so as to deny its use to the enemy.

Moreover, there is no reason to suppose that the result in the *Juragua Iron Co.* case was limited to property located in enemy territory. In relying upon its earlier rationale in *United States* v. *Pacific Railroad*, this Court did not suggest that it no longer applied to property in invaded American territory, *i. e.*, railroad bridges in Missouri. Also, in the *Juragua Iron Co.* case, the Court again completely equated the right of the United States to destroy property for the health and safety of its troops to its right to destroy property occupied and used by enemy troops for hostile purposes. Both stem equally from the necessities of war. If the latter can be done without liability on American soil, as admittedly it can, there is no logical reason for requiring compensation for the former. In any event, we think that there is no basis for hinging the right to compensation upon the location of the property in enemy or friendly territory. Wanton destruction of property is not justified in any place. Article 23 (g) of Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 2302. As this Court held in *Mitchell* v. *Harmony, supra*, the test is military necessity. Particularly in the case of denial destructions, as in the instant case, the only relevant circumstance is whether the property is in the path of war, so that it will be consumed or used

by the enemy unless it is destroyed. Here, the equities favoring compensation to the owners are far less than in the *Juragua Iron Co.* case, since in that case the owners could have expected to retain their property if it had not been destroyed by the United States.

By its decisions in the *Pacific Railroad* and *Juragua Iron Co.* cases, this Court has clearly rejected the principle of the *Grant* and *Wiggins* cases decided by the court below, and, instead, has held that the Fifth Amendment does not require the United States to pay for property destroyed to deny its use to an enemy, just as it does not require payment for property destroyed in actual battle.[11]

D. THE REPEATED REFUSAL OF CONGRESS TO PAY FOR PROPERTY SO DESTROYED IS PERSUASIVE EVIDENCE THAT THE FIFTH AMENDMENT DOES NOT REQUIRE SUCH PAYMENT OF COMPENSATION

The conclusions reached by this Court in *United States* v. *Pacific Railroad*, 120 U. S. 227, and *Juragua Iron Co.* v. *United States*, 212 U. S. 297, find the strongest confirmation in the view of Congress, maintained from the earliest days, that the Fifth Amendment imposes no legal obligation upon the United States to pay for property destroyed to deny its use to the enemy.

[11] In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 687, fn. 41, the dissenting Justices referred to the *Pacific Railroad* case as standing for the proposition that the "taking and destruction of property during the extreme exigencies of a military campaign" are non-compensable.

Even if the question were an open one in this Court, this long-continued Congressional interpretation of the Fifth Amendment would be almost decisive. But, as we have shown, this Court has already accepted the view of Congress that compensation in the circumstances of the present case is "a matter of bounty rather than of strict legal right." *United States* v. *Pacific Railroad*, *supra*, at 239.

Although Congress had occasion to consider the problem of war claims early in our history, the widespread destruction during the Civil War brought the question to a sharp focus. The passage and veto in 1872 of a bill authorizing the payment of the claim of J. Milton Best, recounted by this Court in the *Pacific Railroad* case (120 U. S. 236–239), resulted in a comprehensive analysis of the general subject of war claims by the House Committee on War-Claims. In 1874, the Committee submitted an elaborate report, usually referred to as the Lawrence Report, H. Rept. 262, 43rd Cong., 1st Sess., as revised and enlarged, H. Rept. 134, 43rd Cong., 2d Sess., pp. 205–297. The considered judgment of the Committee, after a comprehensive study of the various categories of war claims, was that the Government is not liable "to make compensation for the property of a loyal citizen in a loyal State seized and destroyed or damaged by competent military authority—*flagrante bello*—to prevent it from falling into

the hands of the enemy, as an element of strength where warlike operations are in progress or where the approach of the enemy is prospectively imminent." H. Rept. 134, *supra*, pp. 281–297.

With respect to the practice of Congress, the Lawrence Report declares that "notwithstanding anything elsewhere said, the right to compensation finds no sanction by the usage of the Government." (*Id.* at 294.) Turning first to the Revolutionary War, the Report points out that, although property was often destroyed to prevent it from falling into the hands of the enemy, Congress never made any provision for paying such claims nor did the States (*Id.* at 294),

Again, during the War of 1812 property was destroyed by the armed forces of the United States to prevent its capture by the enemy. Contrary to respondents' assertion that "the obligation to compensate under such circumstances was consistently recognized and discharged" (Br. in Opp., p. 18), the action taken by Congress with respect to those claims reveals no established usage or recognition of a legal obligation to pay just compensation. Although, as respondents show, some claims were recognized (Br. in Opp., p. 18), similar claims were denied. See *American State Papers, Class IX, Claims,* No. 243, p. 424; No. 587, p. 835; see also the statement of principles set forth in No. 536, pp. 752–753.

Significantly, although Congress did compensate some claimants, it made no general provision for paying for such losses. If, as respondents contend, compensation in the circumstances of the instant case was considered by Congress to be a legal obligation under the Fifth Amendment rather than a matter of bounty, it is hardly to be supposed that Congress would not have provided for payment in a general enactment. Congress did, in fact, provide generally for the payment of other categories of war losses. By the Act of April 9, 1816, 3 Stat. 261, Congress provided (Sec. 5):

> That where any property has been impressed, or taken by public authority, for the use or subsistence of the army, during the late war, and the same shall have been destroyed, lost, or consumed, the owner of such property shall be paid the value thereof, deducting therefrom the amount which has been paid, or may be claimed, for the use and risk for the same, while in the service aforesaid.

In addition, the Act further provided (Sec. 9):

> That any person who, in the time aforesaid, has sustained damage by the destruction of his or her house or building by the enemy, while the same was occupied as a military depositee, under the authority of an officer or agent of the United States, shall be allowed and paid the amount of such damage: *Provided,* It shall appear

> that such occupation was the cause of its destruction.

Subsequently, by the Act of March 3, 1817, 3 Stat. 397, Section 9 was limited to:

> houses or other buildings, occupied by an order of an officer or agent of the United States as a place of deposit for military or naval stores, or as barracks for the military forces of the United States.

The omission of any provision for payment of the category of losses here involved demonstrates, we believe, that Congress did not deem such losses to be legally compensable.[12]

Congressional disposition of the claims arising out of the Civil War further substantiates this conclusion. By the Act of July 4, 1864, 13 Stat. 381, Congress provided compensation for the claims of loyal citizens in states not in rebellion for quartermaster's stores and subsistence actu-

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[12] Insofar as the Act provided compensation for houses destroyed by the enemy, it was said in 1818 by the House Committee on Claims to have been enacted as "a law originating in its benignity, and aimed gratuitously for the benefit of any suffering portion of the community." See *American State Papers, Class IX, Claims*, No. 412, p. 590. In this connection, it should be pointed out that one of the private bills relied upon by respondents—the claim of William H. Washington, 6 Stat. 151 (March, 1815)—was a case which came within the policy later adopted in Section 9 of the Act of April 9, 1816. The Government had placed stores in Washington's house, and blew up the house to prevent the stores from being captured by the enemy. *American State Papers, Class IX, Claims*, No. 266, p. 446.

ally furnished to the Army. However, Section 1 of that Act specifically provided:

> That the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof.[12]

At the expiration of the Civil War, claims which had thus been excluded from the jurisdiction of the Court of Claims were presented to Congress for payment. Several bills providing compensation for losses sustained in circumstances similar to the present case were passed, but each was vetoed by the President. See Veto Messages of June 1, 1872, Sen. Ex. Doc. No. 85, 42nd Cong., 2nd Sess., for the relief of J. Milton Best; June 7, 1872, Sen. Ex. Doc. No. 86, 42nd Cong., 2nd Sess., for the relief of Thomas B. Wallace; January 29, 1873, Sen. Ex. Doc. No. 33, 42nd Cong., 3rd Sess., for the relief of East Tennessee University; February 12, 1873, Sen. Ex. Doc. No. 42, 42nd Cong., 3rd Sess., for relief

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[12] This Act was enacted within a year after the decision of the Court of Claims in the *Grant* case. For the legislative history of the Act, see Cong. Globe, 38th Cong., 1st Sess., pp. 127, 164–168, 261, 282, 909–920, 924–926 (H. R. 66); Cong. Globe, 38th Cong., 1st Sess., pp. 1010, 2774, 2778, 2781, 3188, 3418–3420, 3499, 3513, 3544, 3547 (H. R. 305).

for the destruction of the Manchester, Ky., salt-works.

As this Court noted in the *Pacific Railroad* case, the claim of J. Milton Best focused attention on the issue and occasioned considerable debate. The history of the claim[14] is set forth in detail in the opinion in the *Pacific Railroad* case (120 U. S. at 236–239), and will not be repeated here.[15] We think it pertinent to add, however, that the principles there laid down by the President in his veto message (120 U. S. at 238) were even more forcefully reasserted in his veto of the bill for the relief of the proprietors and

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[14] Cong. Globe, 41st Cong., 2nd Sess., pp. 1947, 2986–2987 (S. 667), 4587, (H. R. 2240); S. Rep. No. 69, 41st Cong., 2nd Sess.,; Cong. Globe, 41st Cong., 3rd Sess., pp. 62–63, 97–102, 165–169, 295–304, 311–319, 1934 (S. 667); Cong. Globe, 42nd Cong., 1st Sess., pp. 22, 84 (S. 105); Cong. Globe, 42nd Cong., 2d Sess., pp. 120, 2252–2253, 3148, 3621–3624, 3648, 3696, 4155–4156 (S. 105); S. Rep. No. 9, 42nd Cong., 2d Sess.; Sen. Rep. No. 412, 42nd Cong., 3rd Sess.; Cong. Globe, 42nd Cong., 3rd Sess., pp. 1164, 1680 (S. 105); 2 Cong. Rec. pp. 10, 29, 1665 (43rd Cong., 1st Sess.).

[15] Contrast the disposition of the J. Milton Best claim with the claim of Josiah O. Armes, referred to by respondents (Br. in Opp., p. 18), for whose relief a private bill had been passed in 1867, 14 Stat. 617. Armes' house had been burned by Federal troops in Fairfax County, Va., to prevent its use by the enemy as a stronghold. See S. Rep. No. 112, 39th Cong., 2nd Sess. The award of compensation appears to have been an exception to the general rule, and a reward made in consideration of the fact that Armes and his wife had been of service to the Federal troops in giving information of the movement and situation of the Confederate forces. See Lawrence Report (H. Rep. No. 134, 43rd Cong., 2nd Sess.) p. 296, note 175.

lessees of certain salt-works in Manchester, Kentucky (S. 161, 42nd Cong.). Their claim was for the value of the salt-works destroyed in October 1862, by the Union forces in the vicinity of Manchester. Having reason to believe that the Confederate authorities proposed to capture and appropriate the large supply of salt on hand, the Federal commander had ordered his troops to destroy the salt-works. The loyalty of the claimants was unquestioned. See S. Rep. No. 50, 42nd Cong., 2nd Sess. In vetoing the bill, the President reiterated that the objections made by him to the bill for the relief of J. Milton Best applied with equal force to this bill, declaring that (Sen. Ex. Doc. No. 42, 42nd Cong., 3rd Sess., pp. 1–2):[16]

> I cannot agree that the owners of property destroyed under such circumstances are entitled to compensation therefore

[16] For the history of this claim, see Cong. Globe, 42d Cong., 2d Sess., pp. 1176, 2258, 2259, 2302, 3148 (S. 161); S. Rep. No. 50, 42d Cong., 2d Sess.; Cong. Globe, 42d Cong., 3d Sess., pp. 694–697, 722, 897, 919, 929, 930, 949, 1288, 1309; 4 Cong. Rec. 4364, 4467 (S. 969, 44th Cong., 1st Sess.); S. Rep. No. 444, 44th Cong., 1st Sess., Parts 1 and 2; 6 Cong. Rec. 58, 238 (H. R. 1025, 45th Cong., 1st Sess.); 13 Cong. Rec. 51 (47th Cong., 1st Sess.); S. Rep. No. 710, 47th Cong., 1st Sess.; 15 Cong. Rec. 11, 759 (S. 13, 48th Cong., 1st Sess.); S. Rep. No. 99, 48th Cong., 1st Sess.; 17 Cong. Rec. 1033, 3176 (H. R. 1929, S. 2070, 49th Cong., 1st Sess.); 19 Cong. Rec. 32, 241 (S. 526, H. R. 2315, 50th Cong., 1st Sess.); 21 Cong. Rec. 111, 3413, 6326 (S. 610, H. R. 9407, 51st Cong., 1st Sess.); H. Rep. No. 2500, 51st Cong., 1st Sess.; 23 Cong. Rec. 26, 234 (S. 206, H. R. 2553, 52d Cong., 1st Sess.); 25 Cong. Rec. 329, 2184 (S. 436, H. R. 3699, 53d Cong., 1st Sess.).

from the United States. Whatever other view may be taken of the subject, it is incontrovertible that these salt-works were destroyed by the Union Army while engaged in regular military operations, and that the sole object of their destruction was to weaken, cripple, or defeat the armies of the so-called southern confederacy.

I am greatly apprehensive that the allowance of this claim could and would be construed into the recognition of a principle binding the United States to pay for all property which their military forces destroyed in the late war for the Union. No liability by the Government to pay for property destroyed by the Union forces in conducting a battle or siege has yet been claimed; but the precedent proposed by this bill leads directly and strongly in that direction; for it is difficult upon any ground of reason or justice to distinguish between a case of that kind and the one under consideration. Had General Craft and his command destroyed the salt-works by shelling out the enemy found in their actual occupancy, the case would not have been different in principle from the one presented in this bill. What possible difference can it make in the rights of owners or the obligations of the Government, whether the destruction was in driving the enemy out, or in keeping them out, of the possession of the salt-works?

This bill does not present a case where private property is taken for public use, in

any sense of the Constitution. It was not taken from the owners but from the enemy; and it was not then used by the Government, but destroyed. Its destruction was one of the casualties of war; and though not happening in actual conflict, was perhaps as disastrous to the rebels as would have been a victory in battle.

Owners of property destroyed to prevent the spread of a conflagration, as a general rule, are not entitled to compensation therefor; and for reasons equally strong, the necessary destruction of property found in the hands of the public enemy, and constituting a part of their military supplies, does not entitle the owner to indemnity from the Government for damages to him in that way.

The failure of Congress to take any further action on the J. Milton Best and salt-works claims evinces, we believe, congressional recognition and acceptance of the principles of liability announced by the President. The establishment of those principles is further shown by the history of the bill for the relief of East Tennessee University subsequent to its veto by the President (S. 490, 42nd Cong.; veto message of January 29, 1873, Sen. Ex. Doc. No. 33, 42nd Cong., 3rd Sess.). The University's claim was not for the destruction of property to deny its use to the enemy, but for the damage and destruction which occurred while the property was being used by Federal

troops—a claim similar to that of the University of Kentucky, for whose relief a private bill had earlier been enacted on January 17, 1871 (16 Stat. 678). The bill was vetoed by the President because its phrasing made it appear to be a claim for destruction similar to that of J. Milton Best. With the approval of the President, the phrasing of the bill was changed and the bill was subsequently enacted in the succeeding Congress. (S. 110, 43rd Cong.; Act of June 22, 1874, 18 Stat. 604). The congressional discussion of the revised bill reveals quite clearly the acquiescence of Congress in the principles enunciated in the denial of the claim of J. Milton Best. See 2 Cong. Rec. 1317–1319, 5200–5201 (43rd Cong., 1st Sess.).

The usage thus established has apparently continued to this date. As previously noted, *supra*, pp. 42–43, Congress, in 1864, had withdrawn jurisdiction of such claims from the Court of Claims. By the Act of March 3, 1883, 22 Stat. 485, Congress again provided that (Sec. 3):[17]

> The jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or damage to property by the Army or Navy during the war for the suppression of the rebellion, or for the use and occupation of real estate by any part of the military or naval forces of the United States

[17] For the legislative history of this Act, see 13 Cong. Rec. 3147–3167, 3184–3206; 14 Cong. Rec. 908–912, 946–953, 3660, 3672–3673.

> in the operations of said forces during the said war at the seat of war; nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States.

Again, Civil War claims which had thus been excluded from the jurisdiction of the Court of Claims were presented to Congress for payment. Adhering to the principles established in the denial of the claims of J. Milton Best and the Manchester, Ky., salt-works, Congress reiterated that "the practice and usage of Government during and since the late civil war is a denial of liability for this class of claims." (S. Rept. 22, 48th Cong., 1st Sess., p. 8). In justification of its position, the Senate Committee on Claims relied in part, as we have, upon the conflagration cases, declaring that (S. Rept. 40, 48th Cong., 1st Sess., p. 2):

> There are two classes of cases in which Government, for public ends, deprives the citizen of his property either in war or peace. One is the exertion of the right of eminent domain by which property is taken for public use. This may be for a military use as well as for a peaceful one, as to build a fort or ship, or supply an army. It is, under our Government, exerted by the legislative authority, either directly or by delegation. The other is the right of necessity, where property is used or destroyed

> to avert an imminent danger, or supply an immediate and pressing necessity of such a character that private interests must yield to it. Of this class are the destruction of dwellings to prevent the spread of a fire, the building of bulwarks on private ground, the entering houses to prevent felonies or arrest offenders, and the like. We think the error of those persons who insist on the obligation of Government to make compensation in cases like the present, is in placing them in the first of these divisions. They seem to us to belong to the second. The conflagration of Moscow, the laying Holland under water by destroying the dikes, the destruction of Athens when her people took to their ships, were not process of law or exercise of the right of eminent domain. They were the acts of self-defense of nations in a death struggle, justified only by that overwhelming necessity of self-preservation which for the time being exonerates individuals and nations from all legal restraint whatever.

The right to compensation was again denied by Congress after the Spanish-American War with respect to the claim of William Hardman. Hardman, a British subject, was employed by the Juragua Iron Company and occupied one of its houses in Cuba. His claim, like that of the Juragua Iron Company which later came before this Court (see *supra*, pp. 35–38), was for household goods and clothing destroyed by United States military authorities during that war to

prevent an epidemic of yellow fever. Anticipating this Court's decision in the *Juragua* case, the Senate Committee on Foreign Relations declared that, "The United States Army had a right to destroy this property, without making compensation to the owners. They had a right to destroy it as an act of war, and they had a right to destroy it in order to prevent an epidemic of yellow fever." (S. Rept. 224, 57th Cong., 1st Sess., p. 2).

More recently, the doctrine of non-liability was adopted in the Federal Tort Claims Act of 1946, which excludes from the coverage of the Act "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U. S. C. 2680. To the same effect, see the Military Claims Act (31 U. S. C. 223b) and the Foreign Claims Act (31 U. S. C. 224d).

Where Congress has authorized the payment of compensation for the destruction of, or damage to, property resulting from action taken by the armed forces of the United States to deny the enemy the use of such property, it has done so as a matter of grace and as part of a broad comprehensive scheme for rehabilitation. Thus, the Philippine Rehabilitation Act of 1946 (60 Stat. 128, 50 U. S. C. App. 1751, *et seq.*)[18] not

[18] For the legislative history of the Act, see S. Rep. No. 755, 79th Cong., 1st Sess.; H. Rep. Nos. 1921, 1957, 79th Cong., 2d Sess.; 91 Cong. Rec. 10788, 10828, 11036, 11463, 11470; 92 Cong. Rec. 3392, 3435–3450, 3676, 3773, 3987, 4038.

only authorized payment for the losses resulting from "action taken by or at the request of the military, naval, or air forces of the United States to prevent such property from coming into the possession of the enemy" but also for concededly non-compensable losses resulting from "enemy attack," "action taken by enemy representatives, civil or military, or by the representatives of any government cooperating with the enemy," and "looting, pillage, or other lawlessness or disorder accompanying the collapse of civil authority." (Sec. 102 (a), 50 U. S. C. App. 1752 (a).) That compensation under this Act is a matter of grace, rather than of constitutional right, is further demonstrated by the proviso of Section 102 (a) that, "in case the aggregate amount of the claims which would be payable to any one claimant under the foregoing provisions exceeds $500, the aggregate amount of the claims approved in favor of such claimant shall be reduced by 25 per centum of the excess over $500." (50 U. S. C. App. 1752 (a)). See also H. Rep. No. 1921, 79th Cong., 2d Sess., p. 9; Schein, *War Damage Compensation Through Rehabilitation: The Philippine War Damage Commission*, 16 Law & Contemp. Prob. 519.[19]

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[19] The exclusion of the respondent Shell Company from the coverage of the Act, because it is a British corporation (50 U. S. C. App. 1752 (b)(4); see Br. in Opp., p. 25), underscores the fact that compensation was not provided in discharge of any constitutional obligation. It is well-settled

The approach adopted by Congress of providing broadly for the compensation of war claims as a humanitarian rehabilitation measure—a measure similar to those adopted by Great Britain and several European countries [20]—suggests a basic fault of the decision below. The widespread "scorched earth" tactics of modern warfare make the payment of full compensation, as a matter of right, a financial impossibility. For economic, as well as humanitarian, reasons, the damages caused by both enemy and friendly forces must be repaired. But the extent of their repair necessarily rests upon the financial strength of the nation at the close of hostilities. If rehabilitation is to be effective, it must be based on considerations of policy which are applicable generally to the nation as a whole rather than on principles of absolute legal liability. The determination of those considerations, we submit, lies with Congress and not with the courts.[21]

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that friendly alien corporations are protected by the Fifth Amendment. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481.

[20] See Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 Law & Contemp. Prob. 347; Brooks, *A Survey of Progress Towards Payment of War Damage Compensation in Europe*, 1 Int'l L. Q. 301; Fraleigh, *Compensation for War Damage to American Property in Allied Countries*, 41 Am. J. Int'l L. 748.

[21] Cf. War Damage Insurance Act of 1942, 56 Stat. 174, 15 U. S. C. 606b–2; Marine War Risk Insurance Acts (Act of June 29, 1936, 49 Stat. 1985, as amended, 54 Stat. 689, 56 Stat. 140, 56 Stat. 214, 57 Stat. 47, 58 Stat. 216) 46 U. S. C. 1128–1128h; Sec. 17 of Contract Settlement Act of 1944, 58

E. NO ACCEPTED PRINCIPLE OR PRACTICE IN INTERNATIONAL LAW SUGGESTS THAT COMPENSATION FOR THE DESTRUCTION OF PROPERTY TO DENY ITS USE TO THE ENEMY SHOULD BE REQUIRED UNDER THE FIFTH AMENDMENT

Since the destruction of property to deny its use to the enemy often involves property owned by nationals of neutral states, the question of whether compensation must be paid for property so destroyed has been a frequent issue before international mixed claims commissions and in discussions between governments. If from such disputes there had developed a generally accepted principle of international law that a belligerent must pay for neutral property which it destroyed to deny its use to the enemy, such a principle might be persuasive in determining whether the Fifth Amendment requires compensation for property so destroyed. However, contrary to the respondent's contention that the decision below reflects "an established and consistently recognized principle of * * * international law" (Br. in Opp., p. 14), there is not only divided opinion among commentators and inconsistency in the decided cases, but also this Court has already rejected the principle of most of the decisions upon which respondent relies.

Stat. 649, 41 U. S. C. 117; Lucas Act of 1946, 60 Stat. 902, 41 U. S. C. 106 note; see also Sec. 8 of the War Claims Act of July 3, 1948, 62 Stat. 1245, 50 U. S. C. App., Supp. V, 2007; Report of War Claims Commission, H. Doc. No. 580, 81st Cong., 2d Sess.; S. J. Res. 171, 82d Cong., 2d Sess.; Cong. Rec., July 5, 1952, pp. 9588–9591.

The court below places considerable emphasis on the writings of Vattel and Grotius (IR. 50, 51);[22] other commentators are also cited by respondents (Br. in Opp., p. 19).[23] But equally

[22] Vattel does not purport to state the consensus on this question but only his own views. He expressly points out that "we may learn from Grotius that authors are divided on this question." Vattel, *Law of Nations*, Bk. III, c. XV, § 232. Further, it should be noted that the correctness of Vattel's position is denied in footnote 181 of the Chitty edition of 1863. Respondents' citation of Grotius is to a general comment on the principles of eminent domain (Bk. II, c. XIV, § 7). Elsewhere, referring directly to the question "What in regard to property already lost in war?", Grotius states that citizens should share the common losses which are suffered by reason of their association, but that "obviously, also, the municipal law may expressly provide that there shall be no right of action against the state for property lost in war, to the end that each individual shall defend his property with greater energy." Grotius, *De Jure Belli Ac Pacis Libri Tres*, Bk. III, c. XX, § 8, *The Classics of International Law*, No. 3, Vol. II (1925 ed.).

[23] The citations to II Oppenheim, *International Law* (2d ed. 1912) 446–449; Spaight, *War Rights on Land* (1911) 510–512; and Taylor, *International Public Law* (1901) 701–704, are entirely inapposite. Oppenheim, Spaight and Taylor are there discussing the right of angary which relates solely to neutral movable property temporarily in the country of a belligerent. (See VI Hackworth, *Digest of International Law* (1943) § 609; Bouvier, *Law Dictionary* (Rawle's Third Revision) p. 195). Since the property here involved had a fixed situs in Manila, it is clear that its destruction has no reference to the right of angary. Further, the citation to Taylor, *op. cit. supra* at 556–557 is, we believe, contrary to the respondents' position rather than in support thereof. The reference to II Halleck, *International Law* (4th ed. 1908) 70–71, is to General Halleck's instructions of March 5, 1863, to the Union Armies. But cf. Vol. I, p. 520, note 1; see also paragraph 15 of the *Instructions For*

eminent writers hold an opposing view. Thus, Wolff states that (*Jus Gentium Methodo Scientifica Pertractatum*, § 830, *The Classics of International Law*, No. 13, Vol. II (1934 ed.):

> Since the strength of the enemy is increased, if he has an abundance of the things which he needs to carry on war in any way, and is diminished, if he is deprived of them, it is allowable to destroy not only hay and straw which the enemy has collected for use in war, and to set fire to gunpowder, but also to destroy flour, and food and drink. Nay more, not only must this be done, in order that our property of this sort may not come into the power of the enemy, but also our other property which is useful in war may be destroyed, in order that it cannot be used against us.

In accord with that statement, a more recent writer, Whiteman, declares that "where the property is in imminent danger of the enemy and is destroyed in order to prevent its falling into enemy hands, compensation is not usually made." II Whiteman, *Damages in International Law*

The Government Of Armies Of The United States In The Field, General Orders, No. 100, April 24, 1863, II Halleck, *op. cit. supra* at p. 56; War Department Basic Field Manual, *Rules of Land Warfare* (FM 27–10, 1940 ed.), par. 314. Lastly, respondents' reliance on Nichols is completely misplaced. Far from supporting respondents, Nichols states that "at the seat of hostilities property may be taken or destroyed no matter who may be the owner, whether friend, foe or neutral." I Nichols, *The Law of Eminent Domain* (3d ed.) § 1.44 [7].

(1937), p. 1429. To the same effect, see also Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 264–265;[24] Davis, *Elements of International Law* (1903), p. 352, note 2; I Nichols, *The Law of Eminent Domain* (3d ed.) § 1.44 [7]; Taylor, *International Public Law* (1901), pp. 556–557; II Wharton, *International Law Digest* (2d ed.), p. 587; Wormser, *Collection of International War Damage Claims* (1944), pp. 157–158.

Respondents assert that liability to pay for property destroyed to deny its use to the enemy was established by the decisions of mixed claims commissions in the cases of *Crutchett, Martin, McDonald, Turner, Barrington, Putegnat's Heirs,*

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[24] Since the respondents have questioned our reliance upon Borchard (Br. in Opp., p. 21), we set forth his discussion of the question from pp. 264–265:

> It has been noted that when military necessity in the presence of the enemy demands the immediate destruction of property to prevent its falling into the enemy's hands no liability is incurred by the belligerent. The line between overruling necessity in the face of immediate danger and deliberate destruction for the ultimate end of preventing its capture by the enemy is often exceedingly vague, so that courts and commissions in numerous cases have considered such destruction under the latter head as an appropriation of private property for the public use and have awarded indemnities to the owner. To justify its destruction without title to indemnity, the danger of its capture by the enemy must be immediate and impending.

Even under the distinction drawn in the quoted passage, the destruction of respondents' oil terminals would not be compensable.

Chourreau, Bertrand and *Labrot* (Br. in Opp., p. 18). *Crutchett's* case is inapplicable as it involved a claim for the use and occupation of a building in Washington, D. C., as a barracks during the Civil War (IV Moore, International Arbitrations (1898), pp. 3734–3735). In *Barrington,* there was "no proof that it was done in the presence of the enemy, who at that time did not seem to have been near" (IV Moore, *op. cit., supra,* p. 3674), a circumstance which would relate to the necessity for destruction. The claim of *Putegnat's Heirs* for property stored in a warehouse which had been turned into a fortification and destroyed by enemy fire, closely resembles battle damage (IV Moore, *op. cit., supra,* pp. 3718–3720). *Labrot's* claim was for trees destroyed to give free range to guns (IV Moore, *op. cit., supra,* p. 3706). The remaining cases, *Martin, McDonald, Turner, Chourreau* (the facts here were confused) and *Bertrand,* involved property located *in enemy territory* which was destroyed by American forces to deny its use to the enemy (IV Moore, *op. cit., supra,* pp. 4378, 3683, 3684, 3705, 3705–3706).

The principle of these cases in awarding compensation for property destroyed in enemy territory was squarely rejected by this Court in *Juragua Iron Co.* v. *United States,* 212 U. S. 297. Moreover, the same French-American mixed claims commission, which made the *Chourreau*

and *Bertrand* awards under the Convention of January 15, 1880, held the French government not liable for the destruction of a factory during the siege of Paris to prevent its use by the Germans. *Giles's Case,* IV Moore, *op. cit., supra,* pp. 3703–3704.

Following the Spanish-American War, compensation was apparently denied where property was destroyed to bar its use by the enemy or for comparable reasons of military necessity. See *Juragua Iron Co.* v. *United States, supra.* Thus, the Statement of Principles of the Spanish Treaty Claims Commission declares that (Sen. Doc. No. 25, 58th Cong., 2d Sess., pp. 6–7):

> The property of alien residents, like that of natives of the country, when "in the track of war", is subject to war's casualties, and whatever in front of the advancing forces either impedes them or might give them aid when appropriated, or if left unmolested in their rear might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents; and no liability whatever is understood to attach to the government of the country whose flag that army bears and whose battles it may be fighting.

Also, the claim of *William Hardman,* a British subject whose personal property had been destroyed in one of the houses involved in the *Juragua* case, was denied by an Anglo-American

tribunal. V Hackworth, *Digest of International Law*, p. 701. In the claim of the *West India Oil Company* for oil which was thrown into the sea by authorities of Manzanillo, Cuba, at the time of an American naval bombardment of that port, recovery was denied, apparently by analogy to the conflagration cases. V Hackworth, *op. cit.*, pp. 701–702.

Pointing to this country's espousal of the claim of the Standard Oil Company of New Jersey against the British Government for the destruction of its properties in Roumania in 1916 to deny their use to the Germans, respondents assert that the Department of State has placed itself forcibly in accord with the position for which respondents contend (Br. in Opp., pp. 18–19). See II *U. S. Foreign Rel.: 1926*, pp. 308–335. In urging its view upon Great Britain, the Department of State cited the *Grant, Wiggins,* and *Mitchell* cases and Turner's Civil War claim (*supra*, p. 58), and made no reference to this Court's decisions in the *Pacific Railroad* and *Juragua* cases. *Id.*, at pp. 328–332. Presumably, the Department of State was seeking to recover for American nationals compensation for denial destructions such as had been accorded Turner and others in claims arising out of the Civil War. At any rate, what is significant is that the British Government asserted that there was no right to compensation, stating (*id.*, at pp. 324–325) that

> * * * the destruction of this property, being, as your memorandum admits, an act of war, gives rise to no legal right to compensation. The principle that "war losses" do not give rise to a legal right to compensation is not limited to war losses in the sense of loss or damage inflicted by the enemy, but covers also loss and damage which the commander in the field is himself obliged to inflict upon the owners of property in the area under his authority: see the decision of the Tribunal in the "Hardman" case in the arbitration between the British and United States Governments * * *.

It is not surprising that, as respondents point out (Br. in Opp., p. 18), only three years later, in 1929, the State Department informed the League of Nations Preparatory Committee of the Conference for the Codification of International Law that the United States had indemnified both its own citizens and foreigners for property destroyed to prevent it from falling into the hands of the enemy. Again, the State Department cited only the *Mitchell*, *Grant*, and *Wiggins* cases, plus the claims of *Turner* and *Martin* (cited as *The York*). As noted above, p. 58, the *Turner* and *Martin* claims involved property located in enemy territory and the principle of the awards in those cases was rejected by this Court in the *Juragua* case.

It is doubtful that the Department of State adheres to those views today. We are advised

by the Department that a contrary conclusion was informally reached in May 1950, with respect to the claim of one of the respondents in this case for damages amounting to $14,500,000 arising out of a foreign government's destruction of property to deny its use to the invading Japanese forces.[25] In any event, it appears that the United Kingdom, despite its 19th century position in such claims as *Turner* and *Martin*, still maintains its 1926 view that belligerent nations are under no obligation to pay compensation for "requisitions which may have been carried out for purposes of destruction or denial to the enemy, which would be regarded as coming within the category of war damage". (see Appendix, *infra*, pp. 64–65).[26]

It is clear, therefore, that in the practice of nations there is no established rule that compensation must be paid for property destroyed in time of war to deny its use to the enemy. While

[25] A memorandum by the Office of the Legal Adviser, dated May 12, 1950, which recommended against intervention on behalf of the claimant by the Department, was furnished to a representative of the claimant to afford the claimant an opportunity to present to the Department a brief in support of its position. As yet, the claimant has not availed itself of that opportunity.

[26] In this connection, we think it pertinent to point out that the position of the British Government in the Standard Oil Company dispute is supported by historical precedent. Moore tells us that Russia summarily denied the claim of an American citizen for the loss of his property as a result of the burning of Moscow in 1812. See VI Moore, *International Law Digest* (1906) p. 883.

the arbitration awards arising out of the Civil War seemed to point toward the acceptance of such a principle of liability, the later trend has been to deny liability. Not only are the international law materials inconclusive on the point, but the reluctance of other nations to accept such liabilities as a matter of law further suggests that it would be unwise for the United States to do so as a matter of constitutional obligation even to its own citizens.

CONCLUSION

We urge, therefore, that this Court should reaffirm the principle expressed in *United States* v. *Pacific Railroad, supra,* and repeatedly stated by Congress, that the Fifth Amendment does not require the payment of compensation for property destroyed by the United States to deny its use to an advancing enemy. Accordingly, it is respectfully submitted that the judgment below should be reversed.

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SEPTEMBER, 1952.

APPENDIX

DEPARTMENT OF STATE,
Washington, D. C., September 8, 1952.

In reply refer to
L/C

The Honorable JAMES P. MCGRANERY,
Attorney General.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to oral discussions between an officer of the Department of Justice and an officer of this Department concerning a communication of April 5, 1949, addressed to the American Embassy at London by the British Foreign Office, which was forwarded to the Department by the Embassy with despatch No. 650 of April 12, 1949.

The Foreign Office's note was in reply to an inquiry addressed to it by the American Embassy at London as to whether Great Britain acknowledges a responsibility to provide compensation to foreign nationals for property requisitioned in Burma and Singapore by British authorities during World War II. The above-mentioned note expressed the following views:

> "Compensation for property requisitioned in Burma and Malaya by the Governments of Burma and Malaya, under local Defence Regulations, is not chargeable to the revenues of His Majesty's Government in the United Kingdom, except insofar as such requisitions may have been on behalf of a United Kingdom Government Department and may therefore be

ultimately chargeable to United Kingdom revenues. This will depend in each case on the circumstances of the requisition and the normal practice of the Departments concerned.

"This exception would not apply to requisitions by or on behalf of the Malay Regiment or other local forces in Malaya and Singapore which were a liability of the Colonial Government. It would however apply to requisitions by or on behalf of any other of His Majesty's Armed Forces including the Burma Army (up to the date of the transfer of power in Burma). In this connection I should make it clear that His Majesty's Government would only accept liability for requisitions for the use of His Majesty's Forces, as distinct from requisitions which may have been carried out for purposes of destruction or denial to the enemy, which would be regarded as coming within the category of war damage."

Sincerely yours,

For the Secretary of State:

/s/ ADRIAN S. FISHER,

Adrian S. Fisher,

The Legal Adviser.